83-488

In The

Supreme Court of the United States

October Term, 1982

No. _____

ROBERT M. KOZACHENKO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a government prosecutor, during presentation of his case-in-chief, may advert to Mr. Kozachenko's failure to accept or reject an invitation to attend the grand jury to tell his side of the story, in violation of the Fifth Amendment to the Constitution?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, ROBERT M. KOZACHENKO, respectfully prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the circuit court of appeals was not prepared for publication and reported

at United States v. Kozachenko, 708 F.2d 719 (5th Cir. 1983), attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 6, 1983. A petition for rehearing was denied on July 29, 1983. (Appendix B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. V:

> "No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law,..."

STATEMENT OF THE CASE

Mr. Kozachenko was charged with the offense of attempted tax evasion of his income tax for the years 1975, 1976, 1977 and 1978 in violation of 26 U.S.C. §7201. The jury found Mr. Kozachenko

guilty of the offense in the years 1975, 1977 and 1978, but acquitted him for the year 1976.

In these tax years, utilizing the "net worth" method of proof, the government established expenditures in each year of sums greatly in excess of the gross income reported by Mr. Kozachenko. The government maintained that Mr. Kozachenko omitted taxable income for 1975 of $12,304.75; 1976 - $31,253.39; 1977 - $43,582.15; and 1978 - $11,785.20 or a total of $98,925.49.

Mr. Kozachenko was a buyer with the Army and Air Force Exchange Service (AAFES). It was the government's theory that the likely source of the unreported income came from bribes paid to Mr. Kozachenko by AAFES vendors, and produced evidence of only one $1,600.00 bribe in 1977 and a microwave oven which Mr. Kozachenko denied. Mr. Kozachenko testified, without dispute, that the expenditures established by the government were made with foreign gambling proceeds of $112,000.00 accumulated in pre-indictment years 1972, 1973,

1974 and early 1975 while in Italy, France and Germany. Mr. Kozachenko's gambling proficiency for winning substantial amounts of money was corroborated by eight witnesses and numerous exhibits.

During direct examination of the government's key witness, Internal Revenue Service (IRS) Agent Santowski, Mr. Alexander abruptly asked the following question:

> "Q What are the facts as to whether or not Mr. Kozachenko was invited to attend the grand jury and present his side of the story?"

The trial court sustained Mr. Kozachenko's immediate objection, instructed the jury to disregard the question, but overruled his request for a mistrial. (Appendix C).

On appeal, Mr. Kozachenko contended that the question infringed on his Fifth Amendment right to remain silent. In federal court, mention of the accused's silence by the prosecutor in his case-in-chief is a violation of constitutional dimension. See, United States v. Impson, 531

F.2d 274, 276 (5th Cir. 1976), cert.denied, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 803 (1978).

The United States Court of Appeals for the Fifth Circuit affirmed, stating on this issue:

> "Although it is far from clear that the prosecution's question was proper, it is clear that the prejudicial effect of the question did not warrant a mistrial in light of the district court's adequate instruction to the jury to disregard the improper question. See United States v. Ylda, 643 F.2d 348, 350-351 (5th Cir. 1981)." (Appendix A, pg. 15).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit rendered its decision in direct conflict with its prior decisions on the same matter, which, in the administration of justice, calls for an exercise of this Court's power of supervision. In addition, the circuit court has decided the constitutional question in conflict with the applicable decisions of this Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975);

and Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). Also, the issue has not been precisely determined by this Court.[1]

This Court in Doyle v. Ohio, supra, raised to a constitutional level the prohibition of prosecutorial comment on silence for impeachment. In United States v. Hale, supra, this Court exercised its supervisory powers over federal courts to hold that prior silence cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result. Grunewald v. United States, supra, precludes cross-examination of a defendant as to why he had asserted the Fifth Amendment plea before the grand jury with reference to a question he later answered at trial.

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1 In Doyle, Hale, Grunewald, and in Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the evidence of silence surfaced during cross-examination of the defendants, whereas here Mr. Kozachenko's silence was referred to during the prosecution's case-in-chief.

In the United States Court of Appeals for the Fifth Circuit, these rules include a ban on the use of defendant's silence in the government's case-in-chief. See, United States v. Impson, 531 F.2d 274, 276 (5th Cir. 1976), cert.denied, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 803 (1978).[2]

In Mr. Kozachenko's case, the circuit court found that a mistrial was not warranted in view of the adequacy of the instruction to the jury relying on its decision in United States v. Ylda, 643 F.2d 348 (5th Cir. 1981). Ylda, however, was decided on the principles enunciated in Chapman v. United States, 547 F.2d 1240, 1249-1250 (5th Cir. 1977), cert.denied, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977) that separated Doyle cases into three categories which weighed the prejudice arising to the defendant by virtue of such a comment against the strength of the government's

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2 See also, United States v. Stevens, 538 F.2d 1203, 1205 (5th Cir. 1976) and United States v. Meneses-Davila, 580 F.2d 888, 891 (5th Cir. 1978).

case. Subsequent to Ylda and Chapman, but prior the decision in Mr. Kozachenko's case, the circuit court decided United States v. Shaw, 701 F.2d 367 (5th Cir. 1983), attempting to alleviate what it identified as "considerable confusion in this Circuit" as to the applicable standard for determining when reversal is required by Doyle violations. Id, at 382. The circuit court said that the later cases have shown "that factual situations are not always amendable to description within the rigid Chapman types." Id., at 382. Further scrutiny of case law "illustrates that this Court's basic concern has been whether or not the improper comment was harmless error because by its nature and under the circumstances it would have only an insignificant impact on the jury." Id, at 383. Among the cases discussed in Shaw having been reversed under this standard, is that of United States v. Impson, 531 F.2d 274, 278 (5th Cir. 1976), cert.denied, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 803 (1978), where the defendant's defense was "not so implausible as to be dismissed out of hand" and evidence of guilt

was "not overwhelming".[3] In Impson, evidence of defendant's silence when arrested was brought out by the prosecutor in his case-in-chief, and thereafter Impson gave exculpatory testimony. The same is true in Mr. Kozachenko's case. Impson followed the rationale of United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). In both Hale and Impson, the trial judge instructed the jury to disregard the evidence, but refused to grant a mistrial. The same succession of events occurred in Mr. Kozachenko's case. The trial court in Hale held that the instruction did not cure the error. See, United States v. Anderson, 498 F.2d 1038, 1045 (D.C. 1972), affirmed sub nom, United States v. Hale, supra. The circuit court made the same ruling in Impson, and there pointed out that such an instruction might have emphasized and aggravated the error before the jury to the effect that the defendant was exercising his Fifth Amendment

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3 Mr. Kozachenko brought the Impson holding to the attention of the circuit court on original appeal.

right to remain silent. The court went on to hold in Impson that the curative instructions to the jury had no controlling significance.[4]

In Mr. Kozachenko's case, the circuit court neither applied the Chapman tripartite analysis as used in Ylda nor its later analysis enunciated in Shaw. The circuit court merely held that the instruction to the jury cured the error in direct conflict with its decision in Impson. In essence, the panel of the circuit case in Mr. Kozachenko's case has overruled the prior decision in Impson, while the panel of the circuit court in Shaw has, in effect, overruled the prior decisions in Chapman and Ylda. In the United States Court of Appeals for the Fifth Circuit, prevailing precedent precludes one panel from overruling the prior decision of another, en banc consideration being required. United States v. Lewis, 475 F.2d 571, 574 (5th Cir. 1973); F.R.App.P. 35.

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4 The circuit court has also held that comments on silence may constitute plain error. See, United States v. Henderson, 565 F.2d 900, 905 (5th Cir. 1978) and United States v. Shaw, 701 F.2d 367, 382, n. 9 (5th Cir. 1983).

Even applying the later standard of United States v. Shaw, supra, to Mr. Kozachenko's case, the error cannot be harmless beyond a reasonable doubt.

An invitation to attend the grand jury before an official accusation has been made would, itself, be to compel self-incrimination, thus bringing the Fifth Amendment into play. Grunewald v. United States, supra, 353 U.S. at 421-422, 77 S.Ct. at 982-983, 1 L.Ed.2d 931 (1957). Mr. Kozachenko had been under investigation by the IRS for more than two and a half years, and as in Grunewald, he was clearly a potential target for indictment.

The point upon which the defense was being constructed [the existence of foreign gambling proceeds in pre-indictment years] was arguably damaged by proof of Mr. Kozachenko's invitation to the grand jury elicited when Mr. Kozachenko's explanation had not yet been brought forward as part of his defense. The obvious implication of

the prosecutor's question was that if Mr. Kozachenko had an exculpatory story to tell, he would have spoken sooner and given the facts to the grand jury before an indictment was returned against him. As against the complete lack of probative value, the question carried with it an intolerable prejudicial impact of two varities.[5] First, the bold purpose of the question was to convey to the jury that Mr. Kozachenko was guilty or else he would not have remained silent. Thus, there was a danger of jury prejudice in advance against any explanation Mr. Kozachenko might offer in his defense. Secondly, the timing of the question makes clear that Mr. Kozachenko's credibility was already in question. Without an understanding of the uncertainties a potential defendant faces in testifying before a grand jury, the jury could

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5 For discussion on probative value and the prejudicial impact on the jury, see United States v. Hale, 422 U.S. 171, 173-177, 95 S.Ct. 2133, 2135-2137, 45 L.Ed.2d 99 (1975), and United States v. Impson, 531 F.2d 274, 279 (5th Cir. 1976), cert. denied, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 803 (1978).

have attributed undue significance to the fact that Mr. Kozachenko offered no explanation to that tribunal, and thereupon disbelieve Mr. Kozachenko's trial testimony or simply discount it as a fabricated story. Compare, Grunewald v. United States, supra, 353 U.S. at 421-423, 77 S.Ct. at 982-983, 1 L.Ed.2d 931 (1957).[6]

Mr. Kozachenko's case was a close one and the evidence of guilt was far from overwhelming as indicated by the verdict of not guilty in the year 1976. The one element of the prosecution's case open to refutation by Mr. Kozachenko was his likely source of the unreported income. Mr. Kozachenko's defense was the existence of foreign gambling proceeds accumulated in pre-indictment years from which the large expenditures were made, well corroborated by others. This explanation was

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6 See also, United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); United States v. Impson, 531 F.2d 274, 277 (5th Cir. 1976), cert. denied, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 803 (1978); United States v. Henderson, 565 F.2d 900, 905 (5th Cir. 1978); United States v. Johnson, 558 F.2d 1225 (5th Cir. 1977); and Walker v. United States, 404 F.2d 900, 902 (5th Cir. 1968).

not entirely implausible and there was no direct evidence to contradict it.

Mr. Kozachenko was further prejudiced by the closing arguments of both prosecutors that referred to his silence, thereby attacking Mr. Kozachenko's credibility by suggesting that he would have spoken out if he had the accumulated funds. Both prosecutors noted that "we had to wait three or four years for this explanation"; "that the $110,000.00 has not come out until now"; "what did he [Mr. Kozachenko] tell you during trial, something that nobody had heard of before"; and that "He said he won $16,000.00 which he put in envelopes. That's the first time anybody -- goodness knows he was interrogated many times about that and this is first time that $16,000.00 has come up". One prosecutor argued that Mr. Kozachenko's defense was "gambling hocus-pocus". (Appendix D).

The conduct of the experienced prosecutor in asking the improper question leading to Mr.

Kozachenko's refusal to accept or reject the invitation to attend the grand jury, with emphasis thereon in closing arguments, was intentional, obviously calculated to prejudice Mr. Kozachenko.[7] Despite the fact that the reference to Mr. Kozachenko's silence was brief and isolated, it was not harmless, and the curative instruction will not suffice to cure the error. See, United States v. Hale, supra, 422 U.S. at 175, n. 3, 95 S.Ct. at 2136, 45 L.Ed.2d 99 (1975) and United States v. Impson, supra, 531 F.2d at 276 (5th Cir. 1976), cert. denied, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 803 (1978).

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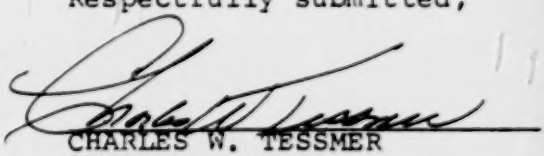
7 The United States Attorney, Mr. James Rolfe, in his supervisory capacity over his assistants, in the United States District Court for the Northern District of Texas, Dallas Division, should adhere to the admonishment given by Circuit Judge Alvin Rubin in United States v. Ylda, 643 F.2d 348, 351 (5th Cir. 1981), calling to the attention of the district judge and the same United States Attorney the impropriety of conduct deliberately designed to invade a well-defined constitutional right.

CONCLUSION

Writ of certiorari should be granted because of the conflict and confusion in the United States Court of Appeals for the Fifth Circuit that requires resolution by this Court, and because of the importance of the question to the administration of justice which has not been precisely determined by this Court.

For the reasons set forth above, petitioner respectfully submits that writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing petition were furnished by United States mail, postage prepaid, to Rex E. Lee, Solicitor General, U.S. Department of Justice Tenth & Constitution Aves., Washington, D.C. 20530, and to Michael L. Paup, Attorney, U.S. Department of Justice, Tax Division, Appellate Section, Washington, D.C. 20530, on this 21st day of September, 1983.

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APPENDIX A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1410

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT M. KOZACHENKO,

Defendant-Appellant.

Appeal From the United States District Court
For the Northern District of Texas

(JUNE 6 , 1983)

Before REAVLEY and JOHNSON, Circuit Judges, and WYZANSKI*, District Judge.

JOHNSON, Circuit Judge:

Appellant, Robert M. Kozachenko, stands convicted of three counts of tax evasion. See 26 U.S.C. § 7201. He was sentenced to concurrent five-year terms on each of the three counts and was fined $30,000. Kozachenko appeals to this Court raising several points of error. This Court affirms.

I. Facts and Course of Proceedings

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* District Judge of the District of Massachusetts, sitting by designation.

On December 17, 1981, a federal grand jury returned an indictment against Kozachenko charging four counts of willfully attempting to evade federal income taxes for the calendar years 1975, 1976, 1977, and 1978. Utilizing the "net worth" method of proving income tax evasion, see Holland v. United States, 75 S.Ct. 127 (1954),[1] the Government maintained that Kozachenko failed to report taxable income of $12,304.75 in 1975, $31,253.39 in 1976, $43,582.15 in 1977, and $11,785.20 in 1978. Kozachenko pled not guilty to the four-count indictment and the case proceeded to a jury trial. As will be seen, the Government and

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1. An excellent summary of the "net worth" method of proving tax evasion was set forth in Holland v. United States:

> In a typical net worth prosecution, the government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of "conduct, the likely effect of which would be to mislead or to conceal."

Holland v. United States, 75 S.Ct. at 131 (citations omitted).

Kozachenko presented sharply conflicting accounts of Kozachenko's tax activity.

At trial, the Government was met with the task of establishing Kozachenko's "opening net worth" on January 1, 1975, the beginning date for the first calendar year of the prosecution period. Holland v. United States, 75 S.Ct. at 134. The Government credited Kozachenko with an opening net worth of $23,000 and based this amount on the testimony of several witnesses. Thereafter, the Government established that Kozachenko had expended funds during the prosecution years far in excess of the amount of funds reported by Kozachenko on his tax returns.

Having established evidence demonstrating that Kozachenko expended more money than he reported as income during the prosecution years, the Government proceeded to introduce evidence as to a likely source of the unreported income. Holland v. United States, 75 S.Ct. at 136-37. During the relevant calendar years, Kozachenko was a buyer with the Army and Air Force Exchange Service (AAFES), a federal agency operating retail stores on Army and Air Force installations throughout the world. According to the Government's theory of the case, Kozachenko obtained the unreported income from bribes paid to him by individuals attempting to influence Kozachenko in the selection of goods purchased for resale by AAFES. Indeed, the jury was presented with evidence supporting the Government's theory.

Government witness Bob Hollander, an employee of Bazar, Inc., a firm that represented manufacturers selling products to the military market, testified that he paid bribes to Kozachenko in return for favorable AAFES treatment. Specifically, Hollander testified that he paid Kozachenko $1600 in March 1977 and the Government introduced a deposit slip dated March 15, 1977, reflecting a deposit by Kozachenko of $1500 in his personal checking account.

David J. Kleinbart, another manufacturer representative to AAFES, also testified that he paid bribes to Kozachenko during the pertinent calendar years. Specifically, Kleinbart testified that he bought Kozachenko a microwave oven in an attempt to obtain favorable AAFES treatment.

Kozachenko, of course, presented a different theory concerning his source of the unreported income. Kozachenko denied that he had accepted bribes in his position with the AAFES, and, instead, maintained that the Government was in error in crediting him with an opening 1975 net worth of $23,000. According to Kozachenko, the unreported income spent during the 1975-78 period came from a $100,000 cash hoard of foreign gambling winnings that he had on hand at the beginning of the prosecution period in January 1975.[2]

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2. Kozachenko's use of this defense is by no means novel. The United States Supreme Court noted the frequent use of this defense as early as 1954. The Court stated:

> Among the defenses often asserted is the

In other words, Kozachenko argued that he had $112,000 on hand in January 1975, and that the unreported income reflected foreign gambling winnings obtained prior to the prosecution period. Evidence was presented demonstrating that Kozachenko was a prolific gambler. However, the exact dates and amounts of Kozachenko's foreign earnings were never demonstrated. Moreoever, the record reflects that Kozachenko did not inform the Government of his foreign gambling theory prior to trial.

Apparently believing the Government's theory in evidence rather than the defendant's, the jury returned verdicts of guilty on three of the four counts. Kozachenko's appeal to this Court followed.

II. Sufficiency of Evidence

As noted previously, the Government relied upon the net worth method of proof to establish Kozachenko's tax deficiencies

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> taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention. However, taxpayers too encounter many obstacles in convincing the jury of the existence of such hoards. This is particularly so when the emergence of the hidden savings also uncovers a fraud on the taxpayer's creditors.

Holland v. United States, 75 S.Ct. at 131.

in 1975, 1976, 1977, and 1978. When proceeding under the net worth method, the Government must establish the defendant's net worth at the beginning and end of each prosecution year. It is an "essential condition" that the Government establish the defendant's opening net worth with "reasonable certainty." Holland v. United States, 75 S.Ct. at 134. Additionally, the Government must produce evidence supporting the inference that the defendant's net worth increases are attributable to taxable income. Id. at 136-37. Hence, the Government must either demonstrate a likely source of taxable income or negate all possible sources of nontaxable income. See United States v. Massei, 78 S.Ct. 495 (1958). Finally, the Government must either track down all leads provided by the taxpayer that are "reasonably susceptible of being checked ... [and] if true, would establish the taxpayer's innocence" or otherwise negate his explanations. Holland v. United States, 75 S.Ct. at 135.

Kozachenko asserts that the evidence presented at trial was insufficient to establish his opening net worth and the likely source of the unreported income. Also, Kozachenko argues that the Government failed to pursue the leads provided by him.

A. Opening Net Worth

Kozachenko argues that the Government failed to establish his opening net worth with "reasonable certainty," since the Government failed to base his opening cash-on-hand on his claimed $112,000 cash hoard and failed to rebut the evidence

demonstrating his gambling activities. This Court has reviewed the evidence in accordance with the principles outlined in Glasser v. United States, 62 S.Ct. 457 (1942), and has concluded that the Government adequately established Kozachenko's opening net worth.

As noted, the Government set Kozachenko's opening net worth at $23,000. This figure was based on credible testimony. Diane Lane, Kozachenko's sister, testified that in 1972, 1973, and 1974, Kozachenko returned to the United States on five occasions and brought with him envelopes containing money. She did not know, however, how much money was contained in each envelope. With no assistance from Kozachenko in determining the amounts brought back, the Government's expert, James Whitfield, assumed that none of the envelopes contained more than $5000, since Kozachenko had not filed any forms reporting the transportation of cash into the United States in excess of $5000, as required by regulations of the United States Customs. The Government's estimation in this regard ultimately turned out to be generous to Kozachenko, since he admitted at trial that he was aware of the Customs regulations and actually had brought back only $4500 on each of the five occasions. Nevertheless, the Government credited Kozachenko with $25,000 net worth.

Witness Whitfield then deducted $5000 on the basis of Diane Lane's testimony that she deposited $5000 of the money brought from Europe in her own bank account. Finally, Agent Whitfield added $3000 to Kozachenko's opening net worth, the highest amount

Kozachenko had stated was his opening cash-on-hand in the interviews with the Internal Revenue Service (IRS) prior to trial. Undoubtedly, this evidence established Kozachenko's opening net worth with reasonable certainty, so that the jury could have concluded that the Government had established Kozachenko's opening net worth beyond a reasonable doubt. See Holland v. United States, 75 S.Ct. at 137.

Of course, Kozachenko maintains that the Government's opening net worth figure is not supported by sufficient evidence, since it excludes the $100,000 allegedly won in foreign gambling casinos. We disagree.

Initially, we note that Kozachenko never brought his foreign gambling theory to the attention of the IRS prior to trial. During the time period in which the IRS was investigating the case and interviewing Kozachenko, he maintained consistently that his opening net worth was between $2000 and $3000. Other factors also detract from the reasonableness of Kozachenko's theory.

In October of 1975, Kozachenko applied for a loan to finance a home costing approximately $50,000. The loan application and financial statement filled out by Kozachenko, however, listed savings of only $16,791 and represented, though falsely, that he had $0,000 in a German bank. Kozachenko's failure to list the $100,000 cash hoard belies his allegation of the hoard's existence. See United States v. Dwoskin, 644 F.2d 418 (5th Cir. 1981). Moreover, Kozachenko's borrowing of approximately $20,000 to purchase the home also suggests the absence of the cash

hoard. See United States v. Schipani, 362 F.2d 825, 830-31 (2d Cir. 1966), vacated on other grounds, 385 U.S. 372. It is reasonable to assume that one having $100,000 in cash earnings would spend that money before borrowing money and incurring an additional interest expense. See United States v. Boulet, 577 F.2d 1165, 1170 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979).

In sum, we simply cannot conclude that the Government failed to establish Kozachenko's opening net worth with reasonable certainty. The Government's proof was based on credible evidence which established Kozachenko's opening net worth at $23,000 with reasonable certainty and the jury certainly could have relied upon this evidence and concluded that the Government had established its case beyond a reasonable doubt. When the evidence is viewed in the light most favorable to the Government and all inferences are resolved in favor of the jury's verdict, it becomes clear that the Government's proof satisfies the standards for review of insufficiency of evidence claims set forth in Glasser v. United States.

B. Likely Source of Unreported Income

Kozachenko next contends that the Government's proof of the likely source of the unreported income was insufficient.

The Government's proof demonstrated that Kozachenko solicited and received bribes while employed by AAFES as a buyer during relevant tax years. The testimony of Hollander and

Kleinbart demonstrated that Kozachenko not only had the opportunities to obtain bribes during the relevant time period, but that Kozachenko, in fact, seized upon this opportunity. Kozachenko testified that as a buyer for AAFES he had hundreds of contacts per year with fifteen to twenty firms representing manufacturers and 100 to 150 vendors. Simply put, the jury had more than ample evidence to conclude that bribes were a likely source of Kozachenko's unreported income. See United States v. Tunnell, 481 F.2d 149, 151-52 (5th Cir. 1973); cert. denied, 415 U.S. 948 (1979); and Untied States v. Costanzo, 581 F.2d 28, 33 (2d Cir. 1978), cert. denied, 439 U.S. 1067 (1979).

C. Government's Investigation of Kozachenko's Leads

Kozachenko contends that the Government failed to pursue the leads he provided them concerning his gambling winnings. However, as noted, Kozachenko never claimed a cash hoard of gambling winnings until he testified at trial. Indeed, he told IRS Agent Santowski that his cash-on-hand was only $2000 to $3000 at the beginning of the prosecution period in January 1975. Moreover, although Kozachenko made vague references to his gambling activities prior to trial, he did not identify the casinos at which he gambled, the dates on which he gambled, or even the amounts he won or lost on each occasion. Since Kozachenko failed to provide leads reasonably narrowing the search for his claimed cash hoard, we cannot hold that the Government failed to investigate adequately these vague leads.

See United States v. Schafer, 580 F.2d 774, 779 n.6 (5th Cir. 1978), cert. denied, 439 U.S. 970 (1978). Finally, for the reasons noted in part II(A) of this opinion, we have substantial doubt as to the reasonableness of Kozachenko's gambling lead. Nevertheless, we find that the IRS adequately pursued all "leads reasonably susceptible of being checked." Holland v.United States, 75 S.Ct. at 135-36.

III. The Bribery Testimony

At trial, Kozachenko objected to the testimony of Government witness Bob Hollander concerning the AAFES bribes, on the grounds that the prejudicial effect of the defendant's prior bad acts outweighed the relevancy of the testimony. The trial court concluded that the evidence was indeed prejudicial, but admitted the evidence on the issue of Kozachenko's likely source of unreported income and his intent. The trial court's ruling is affirmed.

Fed.R.Evid. 403 allows the district court to exclude relevant evidence if the district judge concludes that the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice ...." The trial court's ruling on the issue will not be overturned, however, absent an abuse of discretion. United States v. Enstam, 622 F.2d 857, 865 (5th Cir. 1980), cert. denied, 450 U.S. 912 & 451 U.S. 907 (1981).

As noted previously, the Government was required to introduce evidence demonstrating the likely source of

Kozachenko's unreported income. Bob Hollander's testimony was crucial to the prosecution's case and strongly indicated that Kozachenko's likely source of income was money received from AAFES bribes. Although the testimony was undoubtedly prejudicial to Kozachenko's character and reputation, the testimony's probative value was not substantially outweighed by this prejudice. See United States v. Windham, 489 F.2d 1389, 1391 (5th Cir. 1974).

We also note that the district judge substantially removed any possible likelihood of unfair prejudice through able instructions. The district judge instructed the jury during Hollander's testimony and in the charge to the jury that the defendant was charged only with income tax evasion, that evidence of the receipt of a bribe was not admissible as evidence of guilt as to income tax evasion, and that the evidence was admissible only to show a likely source of unreported income and the defendant's intent to defraud the IRS.

IV. Testimony of IRS Agent James Whitfield

Kozachenko next asserts that the testimony of Government witness Agent Whitfield invaded the province of the jury, and, hence, should have been excluded. We disagree.

IRS Agent Whitfield was the prosecution's chief expert witness. Whitfield testified concerning the IRS' computation of Kozachenko's income tax liabilities and necessarily summarized the sources of the figures making up the Government's case

against the defendant. See Myers v. United States, 356 F.2d 469, 470 (5th Cir. 1966), cert. denied, 384 U.S. 952 (1966); Flemister v. United States, 260 F.2d 513 (5th Cir. 1958).

Although Agent Whitfield did state that he did not believe the assumption that Kozachenko's opening cash-on-hand might be $58,000, he did not say that he disbelieved Diane Lane's testimony as to the amount of cash contained in the envelopes Kozachenko brought with him from Europe. In fact, Whitfield testified that he reached the $5000 per envelope figure on the assumption that Kozachenko would have complied with Customs' regulations and reported any hoard of cash over $5000. Moreover, Diane Lane admitted that she did not know the amounts of money contained in the envelopes. The trial court certainly did not abuse its discretion in allowing the agent's testimony. Furthermore, we again point to the trial court's able instructions. The district judge informed the jury of the role of an expert witness and instructed the jurors that they were the sole determiners of the witnesses' credibility.

V. Cross-Examination of Defense Witness Sala

Kozachenko called Mike Sala to corroborate his testimony demonstrating a proficiency for winning large amounts of money in foreign casinos. During cross-examination of Sala, the prosecutor questioned Sala as to whether he too had paid bribes to AAFES officials. The trial court ultimately allowed the cross-examination, accepting the prosecution's contention that it

was relevant on the issue of Sala's credibility, since bribery constitutes dishonest conduct admissible under Fed.R.Evid. 608(b) on the issue of the witness' "character for truthfulness." Fed.R.Evid. 608(b). The trial court's ruling is affirmed, since the evidence undoubtedly was probative on the issue of witness Sala's veracity as a witness. The trial court's ruling does not reflect an abuse of discretion, but rather, reflects reasoned and considered judgment.

VI. The District Court's Charge

In Kozachenko's "points of error" Nos. 5-9, he attacks various portions of the trial court's charge. We note, that Kozachenko withdrew points of error Nos. 8 and 9 at oral argument. Basically, Kozachenko contends that the trial court erred by refusing to submit several instructions on defensive theories advanced by Kozachenko at trial.

Initially, we note that the district court is not required to instruct the jury in the exact language requested by counsel. United States v. Scheffer, 463 F.2d 567, 573-74 (5th Cir. 1972), cert. denied, 409 U.S. 984 (1972). The trial court's instructions are adequate if they are "sufficiently precise and specific to enable the jury to recognize and understand the defense theory, tested against the evidence presented, and make a definitive decision whether, based on that evidence and in light of the defense theory, the defendant is guilty or not guilty." United States v. Barham, 595 F.2d 231, 234 (5th Cir. 1979). We

have reviewed each of Kozachenko's attacks upon the trial court's charge and conclude that the trial court's charge adequately presented all of the defense's theories with evidentiary foundation legally sufficient to acquit the accused, if believed by the jury. We conclude that the trial court's charge was adequate. United States v. Lewis, 592 F.2d 1282, 1285 (5th Cir. 1979).

VII. The Government's Examination of Agent Santowski

During direct examination of IRS Agent Santowski, the prosecutor asked: "What are the facts as to whether or not Mr. Kozachenko was invited to appear before the grand jury and present his side of the story?" Defense counsel's immediate objection to the question was sustained, the witness was not allowed to answer the question, and the trial court instructed the jury to disregard the question, but refused to grant a mistrial. The trial court's ruling is affirmed. Although it is far from clear that the prosecution's question was proper, it is clear that the prejudicial effect of the question did not warrant a mistrial in light of the district court's adequate instruction to the jury to disregard the improper question. See United States v. Ylda, 643 F.2d 348, 350-51 (5th Cir. 1981). Again, the question was not answered and the jury was immediately instructed to disregard the question.

VIII. Juror Douglas

In Kozachenko's final point of error, he contends that the district court erred by not excluding juror Douglas for cause. We disagree.

During the voir dire examination of prospective jurors, the panel was asked the following question: "The jury is going to hear some testimony about income that allegedly came from gambling, legalized gambling, do any of you have any personal feelings about gambling that would make you biased against the defendant?" Dorothy Douglas indicated that she was opposed personally to gambling. However, after the trial judge explained that Kozachenko was not on trial for gambling, Douglas indicated that she could "listen to the evidence and listen to the witnesses and exhibits and put ... [her] personal feelings about gambling and drinking and anything else aside and return a verdict ... for the government or for the defendant based only on the evidence." Douglas assured the trial court that she would not vote to convict Kozachenko just because he had gambling money.

The record clearly reveals that juror Douglas adequately assured the trial court of her impartiality to the extent that the trial court's refusal to exclude her for cause does not represent an abuse of the broad discretion given the trial court in determining the potential bias of prospective jurors. See United States v. Covey, 625 F.2d 704, 707 (5th Cir. 1980) and United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976).

IX. Conclusion

This Court has reviewed all of the defendant-appellant's points of error and has concluded that the district court's judgment must be affirmed.

AFFIRMED.

APPENDIX B (A-2)
IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUL 29 1983
GILBERT E. GANUCHEAU
CLERK

No. 82-1410

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT M. KOZACHENKO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(JULY 29, 1983)

Before REAVLEY and JOHNSON, Circuit Judges, and WYZANSKI*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

*District Judge of the District of Massachusetts, sitting by designation.

APPENDIX C (A-3)

Q. Yes, sir. All right. Let me ask one more question about that then and I'll get off of it. Did the birth of that child have any influence upon your actions towards Kozachenko whatsoever as regards timing your visit or delaying it or speeding it up?

A. No, none whatsoever.

Q. All right. Did you ever submit a list of written questions to Kozachenko?

A. Mr. Tessmer brought that up yesterday. And when I left the investigation, that last contact I had at Mr. Tessmer's office was my last outside contact on it, but I recommended that we not issue a list of written questions to Bob for him to study and then to respond to.

Q. Well, any particular reason why you didn't?

MR. TESSMER: We object to that as calling for the operation of his mind and his opinion is not binding upon this defendant.

THE COURT: I don't really think we need to go into that, Mr. Alexander.

MR. ALEXANDER: All right, sir.

Q. What are the facts as to whether or not Mr. Kozachenko was invited to attend the grand jury and present his side of the story?

MR. TESSMER: We object to that question, Your Honor. That's prejudicial, improper, has no place in

this case. It is a direct comment upon the Defendant's Fifth Amendment rights under the Federal Constitution. I ask that the question be stricken and Mr. Alexander be admonished not to ask the question again and the jury be instructed to totally disregard it.

THE COURT: Mr. Alexander.

MR. ALEXANDER: My response to that is it was opened up by Mr. Tessmer's questions to George Santowski yesterday.

THE COURT: I think not. I think the objection is good.

MR. ALEXANDER: Very well.

THE COURT: The jury is instructed to disregard that last question.

MR. TESSMER: Your Honor, in view of the prejudicial nature of the question, I respectfully request a mistrial at this time.

THE COURT: Overruled.

Q. Now, during your investigation of Kozachenko, did you attempt to obtain his tax returns for years prior to 1975?

A. Yes, sir, I did.

Q. And were you able to get them?

A. I was able to get the 1973 and the 1974 tax returns. The earlier years had been destroyed.

Q. All right, sir. Now for the years 1973 and 74,

sit here all this time and wait for the story.

Of course, they said, Mr. Santowski, write us questions and we will answer them. They know it's a tax investigation. Mr. Tessmer isn't somebody just out of law school. They know what it's about. They know it's a fact question there. He could come in to mad dog Santowski and say, look, here's the story, I forgot about the $120,000.00 and I brought it back. It's very simple to do, but, no, santowski didn't put his questions down in writing so we had to wait three or four years for this explanation.

I tell you I think the story is absurd, but what I think doesn't matter, it's what you think based on the evidence. It's going to be up to you to decide that. If you think this is all plausible, then you're going to have some difficulty finding the defendant guilty. If you think this is unbelievably absurd from the gambling chips to the loan application where he lied four times to all this other stuff, if you believe that, then it shouldn't take you very long at all.

Thank you.

THE COURT: Thank you, Mr. Williamson.

Mr. Tessmer.

MR. TESSMER: May it please the court. Would Your Honor please call me in 15 minutes?

THE COURT: Yes.

consistent pattern of understatement of income, that can be considered. Second, if there are false statements or omissions to the investigating officers. Now, you realize that an omission in an interview to a Government agent, agents, two of them, can be just as false as a false statement. So when you consider that the $110,000.00 has not come out until now, and without going into all the little things that the defendant omitted or falsified, I submit to you that under that criteria alone that the Government has proved the willfulness of the defendant's act in evading and attempting to evade income tax. The third criteria is the handling of financial affairs in a manner which avoids the usual records such as extensive dealing in cash, dealing in cash in a manner that there would be no bank records available. Then the fourth criteria that the court will tell you in his charge is the failure to supply an accountant with accurate and complete information.

I will call to your attention the testimony of Mr. Bob Lane, the certified public accountant. You will recall that he was the first witness. You will recall he told you that in 1976 that the defendant came to him and said I need you to help me fix up and file my 1975 income tax return. Paraphrasing what Lane said, why did you come to me? What's the problem? Lane told you the defendant said, well, I had gambling income in Germany for 1975. How much was it? The

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to the United States as art objects. I'll refer you to those cameras that he shipped back. Do you recall realize the dollar value that was placed on those cameras. Talk about whether anybody took bribes or not, to me, now I am entitled to make whatever reasonable deduction and logical inference that I care to, I am permitted that under the law, you may disagree with me, but I tell you that the best proof of bribery, to me basing it as a reasonable deduction and logical inference from the testimony and the evidence that you have got here, that list of cameras alone would cause me to convict him of bribery. He's not being charged with bribery in this case, but that's one of the sources of income which the Government can point out to you. You look at that list of cameras. There is not -- I submit to you based upon the evidence that there is such a duplication of expensive camera equipment, lens and accessories, that not even a professional photographer would have that sort of thing as personal property. And what was he buying when he was over there, he was buying cameras. So I submit to you that is something to think about. Don't base your verdict on it alone, but think about that when you're considering the evidence in this case.

Now, what did he tell you during the trial, something that nobody had heard of before. Santowski asked a question to him, Bob, where did the money come from? You

APPENDIX D

Now, he attempts today when he was testifying, he changed his story completely. He said he won $16,000.00 which he put in the envelopes. That's the first time anybody -- goodness knows he was interrogated many times about that and this is first time that $16,000.00 has come up.

Now, let's get back to the $110,000.00 that he had when he was his shipping household effects. He told you that he sent $10,000.00 in cash by air. He also told you that he trusted $100,000.00 in a shipment of furniture. And you heard the testimony that he gave and that others gave about how hazardous it is, how that shipments can be lost, how the containers can be broken into he and broken into and destroyed. Yet, he lists all the other household goods that he shipped by item. He put down the cost, he put the insurance value on the list and yet he would have you believe that he would trust $100,000.00 in cash to a shipment like that. He did not list it, he did not declare it to anybody, he did not insure that $100,000.00. So, he was, according to him he was willing to risk that entire $100,000.00 to get it back to the states in that manner. I submit to you that that is not logical and that the physical facts do not support the defendant's version. Nobody, but nobody except him knows anything about that $110,000.00.

Now, Mr. Tessner has introduced what I call the ghost run defense. For example, if I should tell you, ladies

this is what happened. Once again, hey, I don't know, could be, I don't think so, I am confused.

By the way, if you remember Kathy Wozinak, she had this conversation with the defendant where he was talking about how much he won over in Europe. He said, well, I won almost enough to buy my house and the house is around $50,000.00 or so. And the figures that Mr. Whitfield came up with so far as the cash on hand and his gambling winnings and so forth come out to around forty something thousand dollars, just about what the defendant told Ms. Wozinak that he had won over there, but she is probably wrong too, just like the accountant and Mr. Santowski and everybody else. Everybody is wrong.

We come down to what I like to refer to as the gambling hocus-pocus. That's all these pictures and all these chips. Hey, this is great stuff. There is no dispute that he was over there. We know he was gambling. He told Santowski that. There is no big dispute about it. Nobody is arguing that he wasn't gambling. What do we need all this for? This is neat to look at, but what does it prove. What does this picture prove so far as what he won or what he lost, what he had in cash on hand? What does this mean? What does this have to do with cash on hand? We know he gambled. What is this? It's just a bunch of hocus-pocus. The witnesses that come in, you could have five thousand witnesses sit up

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Then we have the Banice Bazar pay back of the things that, I think, the defendant bought over in Europe. The story on this is that he buys these different items which he names for you and he has and there's no question about that. For the next three or four years he's wandering around, how can I pay for this, how can I pay for this. He doesn't get any receipts. This is on his mind for three years, three or four years, how can I pay for this, how can I pay for this. Finally -- by the way, the investigation out there, which I know you have heard about, is rolling along. He's being investigated. So what happens? He slips this money into a box and gives it to Hollander or to Cross to have it shipped back to Banice Bazar, so he can finally get this heavy load he has on his mind off. He's finally paid after four years cash, no note, hardly no nothing, he's finally paid off this stuff that he bought four or five years ago. That is absurd. That is absurd. If you believe that, don't leave the jury box, say he's innocent if you believe that story.

Ladies and gentlemen, I submit to you that the defendant's story and the gambling hocus-pocus, whatever that's worth, I submit to you that's incredible. Somebody is going to forget that he brought back $100,000.00. He was confused the first day with mad dog Santowski. He's confused the next day, the day after that, the day after that, the day after that and so forth for three or four years. We had to

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